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Nos. 80-1640, 80-1656

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1980

UNITED STATES NUCLEAR REGULATORY COMMISSION, et al.
Petitioners,

v.

STEVEN SHOLLY et al.
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPPOSITION TO FEDERAL PETITIONERS' SUGGESTION OF MOOTNESS

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TABLE OF CONTENTS

Table of Authorities

Argument
I 7
II 13
III 19

Conclusion 24

TABLE OF AUTHORITIES

Cases

Arnett v. Kennedy, 416 U.S. 134 (1973) 5

Diffendorfer v. Central Baptist Church, 404 U.S. 412 (1972) 13

Fuentes v. Shevin, 407 U.S. 67, 81 (1972): 5

Hall v. Beals, 396 U.S. 45, 48 (1969). 14

Princeton University v. Schmid, 102 Sup.Ct. 867 (1982) 13

Sands v. Georgia, 401 U.S. 144 (1971) 20

Sholly v. NRC, 651 F.2d 780 (1980). 7

Southern Pacific Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498 (1911) 15

Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 282 (1969), 16

Union of Concerned Scientists v. AEC, 499

Other Authorities

Article III, U.S. Constitution 13

Atomic Energy Act of 1954, § 189, 42 U.S.C. 2239(a) 2

"Authorizing Appropriations for the Nuclear Regulatory Commission," Conference Report to Accompany H.R.2330, Rep.No. 97-884, 97th Cong., 2nd Sess. 7

Congressional Record H8822, Dec. 2, 1982 21

K. DAVIS, I ADMINISTRATIVE LAW TREATISE, Sec. 3.15 (1978). 10

45 Fed. Reg. 20,491-92, 10

Public Law No. 97-415, 96 Stat. 2067 7

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OPPOSITION TO FEDERAL PETITIONERS' SUGGESTION OF MOOTNESS

This case arose out of the 1979 accident at the Three Mile Island nuclear reactor (TMI), the first accident of its kind. The issue presented in this case is whether the Nuclear Regulatory Commission could permit release into the atmosphere of the waste radioactive materials remaining from the accident at Three Mile Island at a

rate in excess even of that permitted, though rarely experienced by, an operating reactor without providing a meaningful hearing to persons affected by the release of radiation.

An independent scientific study concluded that as a result of the release of the airborne TMI waste material into the environment, from 50 to 300 additional fatal cancers and other genetic effects will appear in the next five to 10 generations. Joint Appendix, 104.

The Nuclear Regulatory Commission (NRC) made a summary finding that the decision to release the TMI radioactive waste materials at a rate faster than that permitted an operating reactor involved "no significant hazards consideration." If supported by evidence, such a determination would have allowed the NRC, in accordance with the fourth sentence of § 189 of the Atomic Energy Act of 1954, 42 U.S.C.

§ 2239(a), to dispense with 30 days notice and publication of its decision.

Respondents challenged the NRC's "no significant hazards consideration" finding in the Court of Appeals, arguing this finding was invalid as a matter of law. See "Petition for Review of Final NRC Orders," No. 80-1691, filed June 23, 1980; "Brief for Petitioners," filed July 31, 1980, pp. 33-46; "Petitioners' Brief in Reply to Respondents," filed August 29, 1980, pp. 32-35.

After the NRC denied respondents' request for a hearing on the license amendment permitting release of radiation from TMI at an increased rate, respondent PANE petitioned the Court of Appeals to order a hearing. The NRC contended in the Court of Appeals that its finding of "no significant hazards consideration" not only allowed it to dispense with notice and publication under § 189, but, by implication, also to

dispense with a requested hearing. The NRC relied on dicta in Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1084 n.36 (D.C.Cir. 1974) that "[a]n amendment can be made without an opportunity for a hearing if the AEC determines that it 'involves no significant hazards consideration.'"

Respondents joined to their first contention -that the NRC's action did indeed involve a significant hazards consideration- a further contention that in any event § 189 did not permit waiver of a hearing, but only waiver of notice and publication, pursuant to such a finding. See "Brief in Support of Petition to Review Final Nuclear Regulatory Commission Orders, Application for Temporary Stay and Other Relief," 80-1783, filed July 8, 1980, 12-20. The Justice Department agreed with respondents' latter contention, that § 189 would not support the NRC's argument for waiver of a hearing. See "Memorandum

of Respondent United States of America," August, 1980, pp. 4-21.

As a separate matter, respondents also argued before the Court of Appeals that the hearing required by § 189, under the circumstances of this case, would have to be a prior hearing. E.g., "Brief for Petitioners," supra, p.51 et seq. Respondents generally relied upon due process considerations reflected in the following language from Fuentes v. Shevin, 407 U.S. 67, 81 (1972):

> If the right to notice and a hearing is to serve its full purpose then, it is clear that it must be granted at a time when the deprivation can still be prevented.

Applying the due process analogy, respondents recognized that not every administrative hearing need be a prior hearing. See Arnett v. Kennedy, 416 U.S. 134 (1973). But it is clear that where an act is irreversible as here, where no important

concerns for urgent action exist, and where life and health interests are involved general due process considerations would require a prior hearing.

The Court of Appeals ruled that § 189 could not justify dispensing with a hearing altogether and also accepted respondents' argument that in this case the hearing would have to be a prior hearing. As a third matter the Court of Appeals found that the case was not moot because the agency's action in denying a hearing in these circumstances was "capable of repetition, yet evading review." 651 F.2d at 784. The Court of Appeals did not address the question whether the NRC's "no significant hazards consideration" finding was correct. 651 F.2d at 786, n.16.

I

Section 12 of Public Law No. 97-415, 96 Stat. 2067 amending § 189 did not overrule the decision of the Court of Appeals below in Sholly v. NRC, 651 F.2d 780 (1980). First, this legislation squarely rejected the NRC's position that authority to dispense with notice and publication implied a right to dispense with a hearing. Rather Congress expressly adopted the position of the Court of Appeals that a hearing is required under the clear terms of § 189. The language of the Act interpreted by the Court of Appeals has been left untouched by Congress. As stated in "Authorizing Appropriations for the Nuclear Regulatory Commission," Conference Report to Accompany H.R.2330, Rep.No. 97-884, 97th Cong., 2nd Sess. (hereafter "Conference Report"), the amendment "maintains the requirement of the current section 189a of the Atomic Energy Act that a hearing on the license amendment be held

upon the request of any person whose interest may be affected." Conference Report 37 (emphasis added).

Second, Congress cured an important defect in § 189 which was suggested in footnote 20 of the Court of Appeals' opinion, where the Court questioned, but did not answer, "whether some notice of the NRC's intention to amend a license is required under the due process clause of the Fifth Amendment or the Administrative Procedure Act notwithstanding a finding of 'no significant hazards consideration.'" 651 F.2d at 787. By imposing new requirements for providing notice of "no significant hazards consideration" amendments, Congress expressed its "intent that, wherever practicable, the Commission should publish prior notice of, and provide for prior public comment on, such a proposed determination." Conference Report 38.

Third, Congress attempted to solve

the problem of distinguishing when a prior hearing might be waived in several ways. The new amendment lays down a general rule that pursuant to a "no significant hazards consideration" finding a prior hearing may be waived. But this authority is subject to several restrictions.

One, the NRC must consult on any "no significant hazards consideration" finding with the State in which the nuclear facility is located. §12(a)(2)(A) & (2)(C)(iii). This consultation includes prior notification of the licensee's request for such an amendment and the NRC's evaluation of it. The reasons for the proposed determination must be discussed with the State and the NRC must listen to and consider the State's comments. The NRC must make a good faith attempt to further consult before issuance of any such license amendment. Conference Report 39. While this does not provide a prior hearing, consultation with the

official local representatives of persons affected by a nuclear facility does afford some greater measure of due process rights than would the legal position advocated by the NRC before this Court.

Two, before § 12 may take effect, the NRC is required to promulgate regulations establishing standards for determining whether an amendment involves no significant hazards consideration. § 12(a)(2)(B) & 12(b). Such standards again provide a greater measure of due process protection. See generally,. K. DAVIS, I ADMINISTRATIVE LAW TREATISE, Sec. 3.15 (1978). It is worth noting that an earlier proposed regulation, 45 Fed. Reg. 20,491-92, had no provision that would cover the instant case. It is presumed that any future regulations promulgated pursuant to this command of Congress would have greater specificity. Congress corrected one problem asserted by respondents in

this case by making clear that,

> These standards should not require the NRC staff to prejudge the merits of the issues raised by a proposed license amendment. Rather, they should only require the staff to identify those issues and determine whether they involve significant health, safety or environmental considerations.... and should ensure that the NRC does not resolve doubtful or borderline cases with a finding of no significant hazards consideration. Conference Report 37.

Three, Congress explained,

> the purpose of requiring prior notice and an opportunity for public comment before a license amendment may take effect, as provided in subsection (2)(C)(ii) for all but emergency situations, is to allow at least a minimum level of citizen input into the threshold question of whether the proposed license amendment involves significant health or safety issues. ...[T]he conferees expect the content, placement and timing of the notice to be reasonably caluculated to allow residents of the area surrounding the facility an adequate opportunity to formulate and submit reasoned comments." Conference Report 38.

This opportunity for reasonable notice was the principal objective of the Sholly suit.

Fourth, and most important, Congress specifically addressed the remaining issue presented by this case, that of a right to a prior hearing on license amendments involving irreversible actions. The essential question placed before the Court by this pending matter is whether an after-the-fact hearing on an irreversible action such as release of radiation satisfies either constitutional or administrative due process. See "Brief for Respondents," filed September 2, 1981, pp. 31-34. Congress addressed this specific issue as follows:

> The conferees intend that in determining whether a proposed license amendment involves no significant hazards consideration, the Commission should be especially sensitive to the issue posed by license amendments that have irreversible consequences (such as those permitting an increase in the amount of effluents or radiation emitted from a facility or allowing a facility to operate for a period of time without full safety protections). In those cases, issuing the order in ad-

> vance of a hearing would as a practical matter, foreclose the public's right to have its views considered. In addition, the licensing board would often be unable to order any substantial relief as a result of an after-the-fact hearing. Accordingly, the conferees intend the Commission be sensitive to those license amendments which involve such irreversible consequences. Conf. Report 37-38 (emphasis added).

II

The enactment of § 12 of Pub. L. No.97-415 did not cause this action to become moot. The compliance of this litigation with the Constitution's Article III live case or controversy justiciability requirement has not been any way compromised, or even affected by, the enactment of §12. This action was not an attack on the constitutionality of a statute which has been repealed or so fundamentally altered as to cure its constitutional defect, e.g. Princeton University v. Schmid, 102 Sup.Ct. 867 (1982); Diffendorfer v. Central Baptist Church, 404 U.S. 412 (1972),

or so changed as to remove the specific complaint brought to Court by the plaintiff, Hall v. Beals, 396 U.S. 45, 48 (1969).

Here the specific complaint brought to Court by respondents (petitioners below) on behalf of the public around Three Mile Island is that the NRC intends to go forward with the clean-up of the TMI reactor in a way which would intentionally release radiation upon them, but would do so without according them a right of participation in an adjudicatory hearing on the related licensing changes. This complaint remains as strong as ever.

The Court of Appeals found that, although the specific occasion for respondents' complaint had passed, the question was representative of a greater problem which could repeat itself in the course of the clean-up and again escape review. This issue was briefed and argued below

and decided by the Court of Appeals. The Court of Appeals' decision that this case was justiciable under Southern Pacific Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498 (1911) was carefully reasoned and was not challenged before this Court.

The enactment of Pub. L. 97-415 in no way affects any of the considerations concerning mootness. The NRC is just as likely to attempt later stages of the cleanup without a prior hearing on the grounds of a "no significant hazards consideration" finding now as before. Respondents' dispute over the NRC's authority to do this is as live and real as it ever was. This case simply has not become moot as a result of enactment of a statute which may affect the outcome of the case on appeal.

While this case has not become moot, it is just as true that under long accepted precedent of this Court, Pub.L. 97-415's amendment to § 189, and its legislative

history, would now need be newly applied to the facts of this case on appeal. As stated in Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 282 (1969), another case where relevant new law was adopted pending appeal of the case, the "general rule ... is that an appellate court must apply the law in effect at the time it renders its decision."

Accordingly, if the Court does not dismiss its writ of certiorari, it would apply the new amendments for the first time to the facts of this case. The new amendments make two issues raised below abundantly clear, i.e. that there is 1) a right to some notice and 2) a right to an adjudicatory hearing, notwithstanding an NRC "no significant hazards consideration" finding.

As to the remaining issue of whether the hearing must be a prior hearing in the context of this case, the focus has

shifted a great deal from that which the case had in the Court of Appeals. The generalized due process considerations presented to the Court of Appeals have now been replaced by the general rule that a prior hearing is not necessary for such amendments, subject to the condition that where amendments involve irreversible consequences, the NRC should be "especially sensitive" in arriving at a "no significant hazards consideration finding." Congress' balance of priorities on this question takes fairly directly into account the facts of this case without necessarily solving the issue. Congress' approach to the issue does rely much more on the specific interpretation put on the words "no significant hazards consideration" and therefore shifts the focus of discussion away from generalized due process considerations to the meaning given these particular words.

Respondents presented to the Court of

Appeals extensive argument attacking the NRC's "no significant hazards consideration" finding as inaccurate and contrary to law. In the light of Congress' tightening up the definition of this catch phrase, previously undefined by case law or legislative history, respondents would refocus and strengthen their arguments. Because the Court of Appeals relied on more generalized due process considerations in deciding that respondents had a right to a prior hearing it was not required to address respondents' arguments attacking the NRC's "no significant hazards consideration" finding.

If the Court does not dismiss the writ of certiorari in this case, the appropriate disposition would be remand to the Court of Appeals for further briefing and decision on the issue of whether the NRC's "no significant hazards consideration" finding could be upheld and a prior hear-

ing denied under the law as newly amended. If this issue is not remanded, the Court should not decide how the new law affects this case without at least further briefing and oral argument focused on the issue.

The discussion above should make clear that this case is not moot. But, at the very least, it would be inappropriate to dispose of this case on the ground of mootness at this stage before the question has been fully briefed, and possibly argued.

III

The writ of certiorari previously granted in this case should now be dismissed. The purpose of this case was to construe the intent of Congress as to whether and when a hearing would be required on a license amendment which involved irreversible consequences but upon which the NRC had made a "no significant hazards consideration" finding.

Congress has now unqualifiedly expressed its intent, leaving no room for construction, that a hearing is required in such cases. This has reduced the importance of this case, which was never very great, and leaves for decision only the question as to when such a hearing must take place. The Court of Appeals did not dwell long on the latter question, and now Congress has provided guidance which completely changes the focus of the inquiry. As stated in a case having a similar factual background: "The focus of this lawsuit has been completely blurred" by this change in law on appeal. See Sands v. Georgia, 401 U.S. 144, 152 (1971). (As here, it was clear in Sands that the case did not become moot because of the change in law, id. 151)

In Sands the Court remanded for further proceedings in order to make a record and sharpen the issues in a manner appropriate for Supreme Court review. As

discussed above this would be a proper disposition for this case as well. But the most appropriate disposition would be to simply dismiss the writ of certiorari. Congress has now construed its own statute in light of the specific facts of the Sholly case. It has made improvements in the level of due process accorded the public. It has made an attempt at balancing diferent interests in determining hearing rights on "no significant hazards consideration" amendments. This new construction of § 189 by Congress is based squarely on the assumption that the Court of Appeals had properly construed the statute in Sholly. Congress made it clear that it intended by the new amendment of § 189 to grant "new authority" to the Commission, not to reestablish old authority mistakenly withdrawn by the Court of Appeals. See Conference Report 36; Congressional Record H8822, Dec. 2, 1982 (Rep. Udall,

House sponsor). Congress did not choose to wait for a more authoritative interpretation of the statute from this Court before acting. It accepted the Court of Appeals' construction of the statute as correct and built on that interpretation toward a new framework for accommodation of the respective interests involved.

The only remaining issue left on appeal in this case must be viewed in light of Congress' new framework for resolving when a prior hearing is required on a "no significant hazards consideration" license amendment. Because Congress has provided fresh guidance on that issue, the need for a decision by this Court to assess the intent of Congress is now less compelling than it might have been when the writ of certiorari was granted.

Proper resolution of this case under the new amendments would require a remand to the Court of Appeals. But any subse-

quent repetition of the problem presented here would also need be presented to the Court of Appeals in a new lawsuit. It would promote judicial economy to permit the Court of Appeals to measure against the Congressional language a new set of facts. It would promote judicial economy to bring this teapot tempest to an end by simply dismissing the writ of certiorari at this time on the grounds that further clarification of the law after Congress has so recently acted does not justify consumption of this Courts' parsimoniously allocated certiorari jurisdiction.

In any event this case is not yet ripe for resolution under the new law because the law will not go into effect until regulations are promulgated by the NRC. § 12 (b), Pub. L. 97- 415. Since the regulations are an integral part of the new statutory scheme this case cannot be resolved under the new law until those regulations have been promulgated.

Conclusion

Respondents oppose the Solicitor General's suggestion of mootness on the grounds of a change in law for the simple reason that the change in law has no bearing whatsoever on the question of mootness in this case. The Solicitor General has cited no case presenting similar facts where the Court has made a finding of mootness.

Cited above are several cases which were found moot under strikingly distinguishable facts, or which were not found moot under similar facts. Cases similar to this one have been remanded for further focusing of the record.

The most appropriate resolution of this case is dismissal of the writ of certiorari, since Congress has confirmed that the Court of Appeals properly construed the intent of Congress in its

decision below and application of the new law enacted by Congress in response to the decision would better await a new fact situation which might develop in light of the new law. In any event no finding of mootness should be made until that issue can be fully briefed and argued by the parties.

Respectfully submitted,

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